Tokio Marine Insurans (M) Bhd v WCT Construction Sdn Bhd & Anor

HIGH COURT (MELAKA) — CIVIL SUIT NO 22NCVC-73–11 OF 2015
VAZEER ALAM J
14 NOVEMBER 2017

Tort — Duty of care — Breach — Insurance claim — Appointment of subcontractor for installation of liquefied petroleum gas — Fire incident — Whether subcontractor owed duty of care — Whether subcontractor fell short of required standard and breached duty of care — Whether subcontractor had onus and responsibility to take reasonable precautions against risk of injury to persons and property damage to others — Whether causation established — Whether type of loss and damage claimed foreseeable and not remote

In consideration of the premiums paid by Aeon Co (M) Bhd ('AEON'), the plaintiff issued two policies of insurance in respect of the construction and completion of a shopping complex in Malacca ('the project') namely: (a) fire insurance policy; and (b) fire consequential loss policy. AEON had appointed the first defendant as the main contractor for the project, and the first defendant had in turn engaged, appointed and/or employed the second defendant as subcontractor for the installation of the liquefied petroleum gas ('LPG') system for the said project. Some of the Food & Beverage ('F&B') tenants, including an outlet known as 'Food & Tea' ('Lots No G48 and G49'), had engaged the second defendant as the contractor for the installation of the internal gas piping system within their respective lots that included the final connection to the tap-off point. The LPG system's final installation and testing works were carried out in stages. On 14 December 2009 and at about 12.20pm, a strong smell of gas was detected at the F&B outlets area and the sound of gas being released was specifically heard from within the Food & Tea outlet. Shortly thereafter, the escaped LPG gas mixture caught fire and exploded, resulting in the death of two persons and severe bodily injuries to several others as well as extensive damage to property ('the incident'). AEON notified the plaintiff of the fire incident and had intimated claims under both the insurance policies. Upon receipt of payment, AEON executed a discharge voucher, in the interim, a sum of RM412,000 and a further final payment of RM17,512,962.51 under the fire policy and fire consequential loss policy. Pursuant to the said discharge vouchers executed by AEON, the plaintiff had been given the rights under subrogation to seek recovery. Also, pursuant to a deed of assignment dated 27 June 2013, AEON had also irrevocably assigned all its rights and benefits to claim from any third parties including the second defendant in relation to the payment made by the plaintiff under the policies of

insurance including the fire policy and the fire consequential loss policy. The plaintiff by reason of the rights in subrogation stepped into the shoes of AEON and brought this action to recover the sum of RM18,413,507.96 paid under the fire and fire consequential loss policies. The first defendant applied to stay proceedings and referred the matter to arbitration as there was an arbitration clause in the contract between the plaintiff and the first defendant. Accordingly, proceedings against the first defendant were stayed and the matter proceeded only against the second defendant. Further, the plaintiff's right of action against the second defendant was also premised on the assignment executed by AEON in favour of the plaintiff.

Held, allowing the claim; ordering the damages to be assessed with costs:

(1) There was sufficient proximity of relationship between AEON and the second defendant. The second defendant had clearly assumed responsibility towards AEON resulting in a duty of care towards the plaintiff (by way of assignment and/or subrogation of rights). Therefore, the second defendant was under a duty at common law to take reasonable steps to avoid exposing AEON, and by extension the plaintiff, to any reasonably foreseeable risk of injury or damage, including the risk of fire and explosion resulting from leakage of gas during the installation and commissioning of the LPG system in the shopping complex. Also, the type of damage suffered by AEON, and consequently the plaintiff was reasonably foreseeable (see para 22).

(2) The standard of care required of the second defendant would be one of competence and diligence expected of a reasonably skilled professional in the field of installing and commissioning such LPG systems. After the last inspection of the valves at the respective outlets, a warning notice should have been tagged to indicate that the valves could only be opened by a designated person prior to or during the final installation and commissioning of the system. Therefore, the second defendant breached its duty of care by its failure to provide sufficient notice or ensure that the tenants were made aware of the precautionary and safety measures in respect of the inherent danger in the event of an accidental or intentional gas release (see paras 25 & 27–28).

(3) The alleged absence of a reasonable opportunity for examination of Lots G48 and G49 due to time constraint would not exonerate the second defendant of its duty of care. It was the onus and responsibility of the second defendant to take reasonable precautions against risk of injury to persons and property damage to others. Before the commissioning of the gas supply, the second defendant, as any prudent competent professional in the field would have done, ought to have ensured that these safety mechanisms were in place and in working order, especially

when third party contractors were known to have carried out works within Lots 48 and 49 after the second defendant's inspection (see paras 38 & 41).

(4) The second defendant had assumed that the risk of gas release due to opened valves within Lots G48 and G49 was quite unlikely to occur and had therefore proceeded to commission the gas supply. However, in so doing, the second defendant had failed to appreciate the fact that such a risk was plainly foreseeable and had further failed to ensure that steps be taken to avert such risk especially in light of the fact that Lots G48 and G49 were closed and locked. Had the second defendant undertook the commissioning of the gas supply on a sectional basis, the risk of explosion would have been averted. Therefore, there was a breach of the second defendant's duty of care (see para 42).

(5) The damage sustained by the plaintiff was caused directly by the accumulation of LPG within Lots G48 and G49 resulting in an explosion. The plaintiff's claim for damages was for the loss and damage arising from the incident suffered by AEON and for which the plaintiff had made out payment to AEON under the two insurance policies. Therefore, the type of loss and damage claimed was entirely foreseeable and was not remote. The investigation findings of PW1 was that the pipe plug in some of the tenanted outlets, particularly Lots 48 and 49 were not sealed off and this was the cause of the gas leak that led to the explosion. These independent findings of PW1 quite clearly and directly connected the causal link between the incident and the damage. The plaintiff had on a balance of probabilities established liability of the second defendant in negligence (see paras 43–44).

[Bahasa Malaysia summary

Sebagai balasan premium yang dibayar oleh Aeon Co (M) Bhd ('AEON'), plaintif mengeluarkan dua polisi insurans berkenaan dengan pembinaan dan penyiapan kompleks membeli-belah di Melaka ('projek') iaitu: (a) polisi insurans kebakaran; dan (b) polisi kerugian akibat kebakaran. AEON telah melantik defendan pertama sebagai kontraktor utama untuk projek tersebut, dan defendan pertama pula melantik dan/atau mengambil defendan kedua sebagai subkontraktor untuk pemasangan sistem petroleum gas cecair ('LPG') untuk projek tersebut. Beberapa penyewa 'Food & Beverages' ('F&B'), termasuk sebuah kedai yang dikenali sebagai 'Food & Tea' ('Lot No G48 dan G49'), mengambil defendan kedua sebagai kontraktor untuk pemasangan sistem paip gas dalaman di dalam lot masing-masing yang termasuk sambungan akhir ke titik ketikan. Kerja pemasangan dan pengujian akhir sistem LPG dijalankan secara berperingkat-peringkat. Pada 14 Disember 2009 dan pada kira-kira 12.20 malam, bau gas yang kuat dikesan di kawasan kedai F&B dan bunyi gas yang dikeluarkan, secara khusus, didengar dari dalam bahagian Food & Tea. Tidak lama selepas itu, campuran gas LPG yang keluar

terbakar dan meletup, menyebabkan kematian dua orang dan kecederaan tubuh yang teruk kepada beberapa orang lain serta kerosakan lanjut pada harta benda ('insiden'). AEON memaklumkan plaintif tentang kejadian kebakaran ini dan membuat tuntutan bawah kedua-dua polisi insurans itu. Setelah menerima bayaran, AEON mengeluarkan baucer pelepasan, sementara itu, sejumlah RM412,000 dan bayaran akhir selanjutnya sebanyak RM17,512,962.51 di bawah polisi kebakaran dan kerugian akibat kebakaran. Bawah baucer pelepasan oleh AEON, plaintif diberi hak bawah subrogasi untuk mendapatkan pengembalian semula. Selain itu, bawah surat ikatan penyerahakkan bertarikh 27 Jun 2013, AEON juga telah menyerahakkan, dan tidak boleh menarik balik, kesemua hak dan faedahnya untuk menuntut daripada mana-mana pihak ketiga termasuk defendan kedua berhubung dengan bayaran yang dibuat oleh plaintif bawah polisi insurans termasuk polisi kebakaran api dan polisi kerugian akibat kebakaran. Plaintif, atas sebab hak subrogasi, memainkan peranan AEON dan memulakan tindakan ini untuk mendapatkan semula jumlah sebanyak RM18,413,507.96 yang dibayar di bawah polisi kebakaran dan polisi kerugian susulan kebakaran. Defendan pertama memohon menangguhkan prosiding dan merujuk perkara tersebut kepada timbang tara karena terdapat klausa timbang tara dalam kontrak antara plaintif dan defendan pertama. Sehubungan itu, prosiding terhadap defendan pertama digantung dan hal perkara hanya diteruskan terhadap defendan kedua. Selanjutnya, hak tindakan pihak plaintif terhadap defendan kedua juga berdasarkan penyerahakkan yang dilaksanakan oleh AEON memihak kepada plaintif.

Diputuskan, membenarkan tuntutan; memerintahkan ganti rugi ditaksir dengan kos:

(1) Terdapat hubungan yang rapat antara AEON dan defendan kedua. Defendan kedua jelas bertanggungjawab terhadap AEON yang menyebabkan kewajipan berjaga-jaga terhadap plaintif (melalui penyerahhakan dan/atau subrogasi hak). Oleh itu, defendan kedua mempunyai tugas bawah common law untuk mengambil langkah-langkah munasabah untuk mengelakkan mendedahkan AEON, dan juga plaintif, kepada sebarang risiko kecederaan atau kerosakan yang boleh dijangka, termasuk risiko kebakaran dan letupan akibat kebocoran gas semasa pemasangan dan pengkomisenan sistem LPG di kompleks membeli-belah. Tambahagan lagi, jenis kerosakan yang dialami oleh AEON, dan akibatnya plaintif boleh dijangka secara munasabah (lihat perenggan 22).

(2) Standard penjagaan yang diperlukan oleh defendan kedua adalah kecekapan dan ketekunan yang dijangka daripada profesional yang berkemahiran yang berpengalaman dalam bidang memasang dan mengkomisenkan sistem LPG tersebut. Selepas pemeriksaan terakhir injap di setiap cawangan, notis amaran sepatutnya diletak untuk

menunjukkan bahawa injap hanya boleh dibuka oleh orang yang ditetapkan sebelum atau semasa pemasangan dan pengkomisenan akhir sistem. Oleh itu, defendan kedua melanggar tanggungjawabnya dengan kegagalan memberi notis yang mencukupi atau memastikan bahawa penyewa sedar tentang langkah berjaga-jaga dan keselamatan tentang bahaya yang wujud sekiranya berlaku ledakan gas yang tidak sengaja atau disengajakan (lihat perenggan 25 & 27–28).

(3) Ketiadaan peluang yang munasabah untuk memeriksa Lot G48 dan G49 disebabkan oleh kekangan masa tidak melepaskan defendan kedua daripada kewajipan berjaga-jaganya. Adalah tanggungjawab defendan kedua untuk mengambil langkah berjaga-jaga yang munasabah terhadap risiko kecederaan orang dan kerosakan harta benda orang lain. Sebelum pengkomisenan bekalan gas itu, defendan kedua, seperti mana-mana profesional yang cekap dalam bidangnya akan lakukan, mestilah memastikan bahawa mekanisme keselamatan ini wujud dan berfungsi, terutamanya apabila kontraktor pihak ketiga diketahui telah menjalankan kerja dalam Lot 48 dan 49 selepas pemeriksaan defendan kedua (lihat perenggan 38 & 41).

(4) Defendan kedua mengandaikan bahawa risiko ledakan gas disebabkan oleh injap terbuka dalam Lot G48 dan G49 tidak mungkin berlaku dan oleh itu meneruskan komisen bekalan gas. Walau bagaimanapun, dengan berbuat demikian, defendan kedua gagal mempertimbangkan fakta bahawa risiko sedemikian jelas dijangka dan seterusnya gagal memastikan langkah-langkah diambil untuk mengelakkan risiko sedemikian, terutamanya berdasarkan fakta bahawa Lot G48 dan G49 ditutup dan terkunci. Sekiranya defendan kedua melakukan pengkomisenan bekalan gas secara bahagian ke bahagian, risiko letupan dapat dielakkan. Oleh itu, terdapat pelanggaran tanggungjawab oleh defendan kedua (lihat perenggan 42).

(5) Kerosakan yang ditanggung oleh plaintif disebabkan, secara langsung, oleh pengumpulan LPG dalam Lot G48 dan G49 yang mengakibatkan letupan. Tuntutan plaintif untuk ganti rugi adalah untuk kerugian dan kerosakan yang timbul daripada insiden yang dialami oleh AEON dan yang mana plaintif telah membuat bayaran kepada AEON di bawah kedua-dua polisi insurans. Oleh itu, jenis kerugian dan kerosakan yang dituntut telah dapat dijangka dan tidak terasing. Penemuan penyiasatan PW1 ialah palam paip di beberapa kedai yang disewakan, khususnya Lot 48 dan 49 tidak dikunci dan ini penyebab kebocoran gas yang menyebabkan ledakan tersebut. Penemuan bebas PW1 ini secara jelas dan langsung menghubungkan hubungan kausa antara kejadian dan kerosakan. Plaintif telah, atas imbangan kebarangkalian, membuktikan liabiliti defendan kedua dalam kecuaian (lihat perenggan 43–44).]

Notes

For a case on breach of duty of care, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 966.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)
Bradford v Robinson Rentals Ltd [1967] 1 WLR 337 (refd)
Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103; [1977] 1 LNS 29, FC (refd)
Griffiths v Arch Engineering Co (Newport) Ltd [1968] 3 All ER 217 (refd)
Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam [1993] 2 MLJ 474; [1993] 3 CLJ 160, HC (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Master Brisbane ak Itang v Robinson Lee (c/o Sekolah Kebangsaan (Cina) Sungai Menyan) & Ors [2013] 5 MLJ 604, HC (refd)
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2) [1967] 1 AC 617, PC (refd)
Shahidan Shafie v Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587, CA (refd)
Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd [2008] 6 MLJ 342; [2008] 6 CLJ 160, CA (refd)
Wyong Shire Council v Shirt [1980] HCA 12, HC (refd)

Legislation referred to

Gas Supply Act 1993 ss 2, 11, 39
Gas Supply Regulations 1997 regs 53(2), 60(3), 63(1), 65

Sagadevan Thagavelu (Sharveena Thevy with him) (Shearn Delamore & Co) for the plaintiff.
Shahinuddin Shariff (Shahinuddin & Ranjit) for the defendant.

Vazeer Alam J:

[1] The plaintiff's case is that the second defendant was negligent in carrying out the gas installation works as agent and/or servant of the first defendant. The particulars of the breach of duty, which the second defendant is alleged to have committed, are listed in para 13 of the statement of claim. The plaintiff also has an additional or alternative claim for damages arising from breach of statutory duty.

[2] By way of background, the facts are as follows. The plaintiff carries on business as insurers. In consideration of the premiums paid by Aeon Co (M)

Bhd ('AEON'), the plaintiff had issued two policies of insurance in respect of the construction and completion of a shopping complex in Malacca ('project'), namely:

(a) Fire Insurance Policy No W–F–A9–DR–002164; and

(b) Fire Consequential Loss Policy No W–F–A9–DR–000090.

[3] AEON had appointed the first defendant as the main contractor for the project, and the first defendant had in turn engaged, appointed and/or employed the second defendant as subcontractor for the installation of the liquefied petroleum gas ('LPG') system for the said project, which, inter alia, included the following works:

(a) installation of the main gas supply pipes from the LPG main tank to the distribution pipes;

(b) from the distribution pipes to the 'tap off' point pipes located inside the food and beverage outlets; and

(c) the supply and installation of the safety control valves, gas detectors and gas meters to the food and beverage tenants ('F&B tenants') of the shopping mall.

[4] Some of the F&B tenants, including an outlet known as 'Food & Tea' (Lots No G48 and G49) had engaged the second defendant as contractor for the installation of the internal gas piping system within their respective lots that includes the final connection to the tap-off point.

[5] The plaintiff states that:

(a) the installation of the LPG system was completed sometime in late September or early October 2009;

(b) the LPG tank system (consisting of two tankers, two vaporisers and one unit of oil separator and their pipeline) was tested on 21 October 2009;

(c) the piping installation inside all the tenants' kitchen (including that of 'Food & Tea') was completed by the end of November 2009;

(d) the installation of gas detectors (to detect leakage) at the tenants' outlets were carried out during the period from 3 December 2009–7 December 2009;

(e) the final installation and commissioning of the LPG system was scheduled to be completed on 14 December 2009, and included the following works:

(i) the meters were to be installed and the gas detectors connected;

(ii) the connection of the main gas supply pipeline from the meter to the tenants' tapping point; and

(iii) the LPG was to be released to each tenant's kitchen stove in stages.

[6] The LPG system's final installation and testing works were carried out in stages on 14 December 2009 and at about 12.20pm strong smell of gas was detected at the F&B outlets area and sound of gas being released was specifically heard from within the 'Food & Tea' outlet. Shortly thereafter, the escaped LPG gas mixture caught fire and exploded resulting in the death of two persons and severe bodily injuries to several others as well as extensive damage to property ('the incident').

[7] AEON notified the plaintiff of the fire incident and had intimated claims under both the insurance policies referred to above. The plaintiff appointed Maphilindo International Sdn Bhd ('Maphilindo') as adjusters to investigate and assess the loss and damage sustained by AEON.

[8] Maphilindo have issued the following reports:

(a) immediate advice dated 15 December 2009 (see exh P7 at pp 1–3 Bundle B);

(b) preliminary advice dated 29 December 2009 (see exh P8 at pp 4–5 Bundle B); and

(c) final report dated 22 November 2009 (see exh P9 at pp 6–36 Bundle B) and the appendix to the report are marked as exh P12 at pp 37–45 Bundle B and exh P13 at pp 46–182 Bundle B).

[9] Upon receipt of payment, AEON had executed discharge voucher dated 25 May 2010 for an interim a sum of RM412,000 (exh P14 at p 80 Bundle A) and a further final payment of RM17,512,962.51 (exh P15 at p 81 Bundle A) under the fire policy and fire consequential loss policy. Pursuant to the said discharge vouchers executed by AEON, the plaintiff had been given the rights under subrogation to seek recovery.

[10] Pursuant to a deed of assignment dated 27 June 2013, AEON has also irrevocably assigned all its rights and benefits to claim from any third parties including the second defendant in relation to the payment made by the plaintiff under the policies of insurance including the fire policy and the fire consequential loss policy (see exh P5 at pp 82–84 Bundle A).

[11] The plaintiff, based on the rights of subrogation, claims recovery of these payments made to AEON on the basis that the loss and damage arose from breach of contract and/or negligence of the first defendant and/or the

second defendant as agent and/or servant of the first defendant.

[12] The first defendant applied to stay proceedings as between the plaintiff and the first defendant and refer the matter to arbitration as there was an arbitration clause in the contract between the plaintiff and the first defendant. Accordingly, proceedings against the first defendant was stayed and the matter proceeded only against the second defendant.

[13] The plaintiff's cause of action against the second defendant is based on the tort of negligence and/or breach of statutory duties or obligations. The plaintiff by reason of the rights in subrogation steps into the 'shoes' of AEON and brings this action to recover the sum of RM18,413,507.96 paid under the fire policy and fire consequential loss policy. See *Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam* [1993] 2 MLJ 474 at p 480; [1993] 3 CLJ 160 at p 163 and *Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd* [2008] 6 MLJ 342 at p 351; [2008] 6 CLJ 160 at pp 175–176.

[14] Further, the plaintiff's right of action against the second defendant is also premised on the assignment (exh P5 at pp 82–84 Bundle A) executed by AEON in favour of the plaintiff. See *Principles of Insurance Law* (5th Ed) by Poh Chu Chai at pp 1061–1062 where the learned author has stated:

> When a loss suffered by an insured under an insurance policy is wrongfully caused by a third party, the insured is entitled to maintain an action in tort against the third party. If an insurer who has indemnified an insured duly takes an assignment of the insured's cause of action against the tortfeasor, the assignment will entitle the insurer to bring an action against the tortfeasor in the insurer's own name to recover the losses suffered by the insured.

[15] The trial proceeded purely on the issue of liability with damages to be assessed after determination of the issue of liability. The following witnesses gave evidence during the course of trial:

No	Witnesses for plaintiff	Evidence
1.	PW1 En Roslee bin Esman Pengarah, Jabatan Kawal Setia dan Penggunaan Gas, Suruhanjaya Tenaga	Oral evidence at pp 4–27 NOE dated 15 March 2017 and 59–63 NOE dated 26 March 2017
2.	PW2 En Rahim bin Mat Assistant Security Officer AEON	— Witness statement ('PWS1') — Oral evidence at pp 27–29 NOE dated 15 March 2017

No	Witnesses for plaintiff	Evidence
3.	PW3 Mr Daniel Dass Devadass Pengurus Operasi di Gamuda (formerly Manager AEON)	— Witness statement ('PWS2') — Oral evidence at pp 29–34 NOE dated 15 March 2017
4.	PW4 Ms Tan Sock Yee Senior Manager Claims Tokio Marine Insurans (M) Berhad	— Witness statement ('PWS3') — Oral evidence at pp 34–43 NOE dated 15 March 2017
5.	PW5 Mr Ong Beng How Assistant Loss Adjuster Maphilindo International Sdn Bhd	— Witness statement ('PWS4') — Oral evidence at pp 44–48 NOE dated 15 March 2017
6.	PW6 En Khairul Za'am bin Mohamad Nor Manager — Incident Management Petronas Carigali Sdn Bhd (formerly Forensic Services Sdn Bhd)	— Witness statement ('PWS5') — Oral evidence at pp 52–105 NOE dated 16 March 2017
7.	PW7 Mr Vicneswaran a/l Subramaniam Project Manager AEON	— Witness statement ('PWS6') — Oral evidence at pp 2–8 NOE dated 22 May 2017
8.	PW8 En Ahmad Fazli bin Abu Bakar General Manager — Operation AEON	— Witness statement ('PWS7') — Oral evidence at pp 8–12 NOE dated 22 May 2017

No	Witnesses for second defendant	Evidence
1.	DW1 Mr Tan Kwan Hai Managing Director second defendant	— Witness statement ('DWS1') — Oral evidence at pp 14–58 NOE dated 22 May 2017
2.	DW2 En Muhammad Faizzul bin Razali Site Supervisor second defendant	— Witness statement ('DWS2') — Oral evidence at pp 63–80 NOE dated 26 May 2017

No	Witnesses for second defendant	Evidence
3.	DW3 Pn Jiwaliza bt Sauni Engineering/Project Manager Bumi Fokus Sdn Bhd	— Witness statement ('DWS3') — Oral evidence at pp 80–83 NOE dated 26 May 2017
4.	DW4 Mr Wong Kam Weng Mechanical — Electrical Manager WCT Constructions Sdn Bhd	— Witness statement ('DWS4') — Oral evidence at pp 84–95 NOE dated 26 May 2017
5.	DW5 En Muhamad Rizal bin Salleh Senior Techno Commercial Engineer Pioneer Pegasus Sdn Bhd	— Witness statement ('DWS5') — Oral evidence at pp 95–99 NOE dated 26 May 2017

[16] Parties have filed statement of agreed facts ('encl K') agreeing to, inter alia, the following facts:

(a) AEON had awarded to the first defendant the construction contract to the said project;

(b) the first defendant had appointed the second defendant as the subcontractor to install the LPG system for the said project including:

(i) installation of the LPG bulk tank and the main gas pipelines from the LPG bulk tank to the distribution pipeline;

(ii) from the distribution pipeline to the 'tap-off' point located within the F&B outlets;

(iii) supply and install safety valves, gas detectors and gas meters to the tenants of the F&B outlet in the shopping complex; and

(c) installation of the pipeline within the tenants' kitchen (including to an outlet named 'Food & Tea') located at Lot G48 and G49 was completed at the end of November 2009.

[17] Final installation of the LPG system by the second defendant was scheduled on 14 December 2009 which involved the following works:

(a) meters to be installed and gas detector to be activated;

(b) connecting the main gas supply pipes from the meter to the 'tapping point' of the tenants; and

(c) LPG would be supplied to every tenants' stove in stages.

[18] During the trial, the following facts narrated by the witnesses are not in dispute:

(a) that on 14 December 2017 when the DW1 started the commissioning of the gas supply to the F&B tenants in the morning, the representative from 'Food & Tea' (the tenant of Lot G48 and G49) was not present;

(b) Lots G48 and G49 were closed and locked with the roller shutter down;

(c) DW1 was fixing the gas meter to initiate commissioning of the gas supply at the Kenny Rogers outlet (Lots G92 and G93) which is nearer to the gas bulk tank situated outside the shopping mall, and Lots G92 and G93 were on the other extreme end of the shopping mall away from 'Food & Tea' outlet (Lots G48 and G49); (see p 156 Bundle B — enlarged copy tendered at trial);

(d) there are five ceiling valves located along the gas pipelines from the Kenny Rogers outlet (Lots G92 and G93) to the 'Food & Tea' outlet (Lots G48 and G49) area and specifically three ceiling valves along the pipelines leading directly to Lots G48 and G49;

(e) there was odour of gas at the vicinity of 'Food & Tea' outlet (Lots G48 and G49) when DW1 was in the midst of commissioning the gas supply to the Kenny Rogers outlet (Lots G92 and G93);

(f) DW1 had dispatched DW2 and one En Tarmizi (second defendant's staff) to investigate the gas smell at the 'Food & Tea' outlet. Thereafter, DW1 followed suit with one Mr Lai. DW1 noticed that the roller shutter of the 'Food & Tea' outlet was still closed and locked and they had attempted to look for a way to enter the outlet. As a safety measure, DW1 then instructed his staff to close the last valve in front of the 'Food & Tea' outlet, the main valves as well as all the valves in the neighbouring outlets (see para 4 at p 9 DWS1);

(g) there was an explosion from within the 'Food & Tea' outlet resulting in damage to property, injury to persons and two fatalities; and

(h) prior to the incident, the mall was undergoing cleaning and decorating works and workmen were seen putting up decorations and fitting and using wood cutting machines such as circular saw and air compressor. These equipment were placed within the vicinity of the 'Food & Tea' outlet and were running at the time of the explosion (see para 3 at p 10 DWS1).

ANALYSIS OF THE PLAINTIFF'S CLAIM AND EVIDENCE

[19] The plaintiff's cause of action is premised on the tort of negligence and/or breach of statutory duty. To succeed on a claim for negligence, the plaintiff has the burden to satisfy on a balance of probabilities that:

A (a) the second defendant owed a duty of care;

(b) the second defendant had breached the said duty;

(c) the plaintiff had suffered damages; and

B (d) causation ie, that the damage suffered by the plaintiff was caused by the second defendant's breach of duty.

[20] Although the second defendant was the subcontractor appointed by the first defendant for the installation, testing and commissioning of the LPG, and C though there is no contractual nexus between the second defendant and AEON, the second defendant was at all material times aware that the said shopping mall was being constructed for AEON as the employer. The certificate to install LPG system issued to the gas contractor identified the owner of the premises as AEON. Further at cl 8 of the letter of award which D provides for the method of measurement (subcontract sum) was based on the main contract between AEON and the first defendant. The second defendant, therefore, had full knowledge that AEON was the owner of the shopping complex.

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[21] The test for the imposition of a duty of care as set out in the case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 was followed by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, where Steve Shim CJ (Sabah and Sarawak) F distilled the test in *Caparo* to the elements of 'foreseeability, proximity and the additional requirement of justice, fairness and reasonableness'.

[22] By reason of the matters aforesaid, I agree with the plaintiff's submissions that there is sufficient proximity of relationship between AEON G and the second defendant. The second defendant has clearly assumed responsibility towards AEON resulting in a duty of care towards the plaintiff (by way of assignment and/or subrogation of rights). Therefore, the second defendant is under a duty at common law to take reasonable steps to avoid exposing AEON, and by extension the plaintiff, to any reasonably foreseeable H risk of injury or damage, including the risk of fire and explosion resulting from leakage of gas during the installation and commissioning of the LPG system in the shopping complex.

[23] The type of damage suffered by AEON, and consequently the plaintiff, I is in my view reasonably foreseeable. In *Bradford v Robinson Rentals Ltd* [1967] 1 WLR 337 His Lordship Rees J at pp 344–345 stated:

> The law does not require that the precise nature of the injury must be reasonably foreseeable before liability for its consequences is attributed. The point is thus dealt with in a convenient way in *Salmond on Torts*, 14th Ed (1965) at p 719:

> (i) Type of damage must be foreseen. It has been made plain that the precise details of the accident, or the exact concatenation of circumstances, need not be foreseen. It is sufficient if the type, kind, degree or order of harm could have been foreseen in a general way. The question is, was the accident a variant of the perils originally brought about by the defendant's negligence? The law of negligence has not been fragmented into a number of distinct torts.
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> ...
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> Valuable statements of the same principle are to be found in *Hughes v Lord Advocate* ... Lord Jenkins said:
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> It is true that the duty of care expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against. Each case much depends on its own particular facts.

In any event, it is pertinent to note that the second defendant has not disputed in the pleading and/or the evidence tendered that it owed a duty of care to the plaintiff.

[24] As for the breach of the duty of care, the second defendant states that it has sufficient technical ability to perform the works for the LPG system and has obtained the 'Perakuan Kekompetenan Jurutera Gas' from the energy commission dated 4 October 2006. Therefore, the second defendant is a 'competent person' within the definition of that term as provided in s 2 of the Gas Supply Act 1993 and the regulations made thereunder.

[25] Since the installation, testing and commissioning of the LPG system is specialised and technical, which requires certification of competence from the energy commission, the second defendant would be categorised as a professionally skilled contractor. The standard of care expected from the second defendant who held out as having professional skill is set out by the author of *Winfield & Jolowicz on Torts* (18th Ed) at p 285:

> Where, however, anyone practices a profession or is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the amount of competence associated with the proper discharge of the duties of that profession, trade or calling, and if he falls short of that and injures someone in consequence, he is not behaving reasonably.

Thus, the standard of care required of the second defendant would be one of competence and diligence expected of a reasonably skilled professional in the field of installing and commissioning such LPG systems. In this regard, I agree with submissions of learned counsel for the plaintiff that the evidence of the following witnesses clearly establishes that the second defendant had fallen

short of the required standard and breached the duty of care owed to the plaintiff:

(a) En Roslee bin Esman ('PW1') — the investigating officer for energy commission;

(b) En Khairul Na'im bin Mohamad Nor ('PW6') — a forensic expert from Forensic Services (M) Sdn Bhd;

(c) Mr Tan Kwai Hai ('DW1') — the competent gas specialist of second defendant;

(d) En Muhammad Faizzul bin Rosali ('DW2') — the site supervisor from second defendant; and

(e) Mr Wong Kam Weng ('DW4') — mechanical and electrical manager of first defendant.

[26] I will now deal with the relevant evidence of the aforesaid witnesses which establishes that the second defendant had breached its duty of care. The following evidence is useful in that regard:

(a) failing to provide or ensure that the F&B outlet tenants were made aware of the precautionary and safety steps or measures prior to the commissioning of the gas supply;

(b) failing to check or re-check the condition and status of the solenoid valve (gas detection system), the ball valves and pipe plug especially in Lots G48 and G49 prior to commissioning the supply of LPG;

(c) failing to carry out the commissioning of the gas supply by way of sectional basis especially since Lots G48 and G49 were at the material time closed and locked; and

(d) carrying out the commissioning of the gas supply on 14 December 2009 without ensuring the condition and status of the solenoid valve, ball valve and pipe plug especially in Lots G48 and G49 despite having knowledge that works had been carried out at these premises after the second defendant's inspection of the LPG system on 10 December 2009.

[27] Now, let me take each of these four issues one by one. As regards the issue of failure to provide or ensure that the tenants were made aware of the precautionary and safety measures, the evidence shows as follows.

(a) DW1 in his evidence had agreed that the commissioning of gas supply was quite dangerous (see p 48 NOE dated 22 May 2017). Yet there had been no instructions or guidelines issued to the tenants with regard to the precautions and safety measures that needed to be taken prior to the commissioning of the gas supply. A simple precautionary statement in

the letters addressed to the tenants to the effect that they are not to meddle with the valves and other safety features installed at their respective outlets from the date of the letters on 10 December 2009 to the date of commissioning of gas supply on 14 December 2009 would have sufficed. However, the second defendant failed to do that; and

(b) PW6 in his opinion report dated 3 March 2011 (exh P13 at p 78 Bundle B) had noted that the second defendant had sent a letter to all tenants notifying them of the commissioning of the LPG system on 14 December 2009 but did not include any instruction/guidelines on the precautions that needed to be taken during the final installation and commissioning. All the tenants were only instructed to be present at their respective outlets and the letter did not specify any safety precautions. The findings made by PW6 was confirmed by the second defendant's witness, DW4 (Mr Wong Kam Weng) (at pp 94–95 NOE dated 26 May 2017) during cross-examination that no instructions were given by the second defendant, its servants or agents, about the precautions that needed to be taken during the final installation.

[28] PW6 has stated in his opinion report (exh P13 at p 81 Bundle B) as follows:

> As a good practice, after the valves were closed, they should be tagged to indicate that the valves can only be opened by the designated person ...

This, I accept is a very important precautionary measure that the second defendant ought to have taken. After the last inspection of the valves (in their closed position) at the respective outlets on 10 December 2009, a warning notice should have been tagged to indicate that the valves can only be opened by a designated person prior to or during the final installation and commissioning of the system on 14 December 2009.

[29] Therefore, I find that the second defendant breached its duty of care by its failure to provide sufficient notice or ensure that the tenants were made aware of the precautionary and safety measures in respect of the inherent danger in the event of an accidental or intentional gas release.

[30] The second defendant had also fallen short of the standard of care required of it by failing to re-check the condition and status of the solenoid valve, ball valve and the pipe plug especially in Lots G48 and G49 prior to the commissioning of LPG system on 14 December 2009. PW1, En Roslee bin Esman, an independent witness from the energy commission, the regulatory authority, had investigated the incident and prepared a summary of report dated 10 February 2010 (exh P1 at pp 183–192 Bundle B). And in that report, PW1 had stated that according to the fire and rescue department's early

investigation on the cause of the explosion, the ball valve was in an open position and the end of the pipe was not sealed off with pipe plug (stopper) in the 'Food & Tea' outlet No G48 and G49 (see para 4 at p 187 exh P1). This open position of the valve had allowed gas to flow out and escape into the atmosphere when the final installation and commissioning was being done. PW1's examination showed 51 lots were fixed with dropper pipes. Most of the dropper pipes in the building that were damaged were not fixed with meters, and the end of the dropper pipes were not fixed with pipe plug and/or sealed off (see para 2 at p 188 exh P1). DW1 had agreed to these factual findings in cross-examination (see pp 29–30 NOE dated 22 May 2017).

[31] PW1 in his evidence also stated that when there was a four day delay between the second defendant's installation and inspection of the LPG system on 10 December 2009, and commissioning of gas supply on 14 December 2009, any 'competent person before supplying the gas must ensure all valves are closed and the valve ends are closed in all outlets to be supplied with gas. The competent person must re-check, it is his responsibility' (see p 18 NOE dated 15 March 2017). This, I find is a mandatory requirement. The second defendant as a professional and competent LPG systems installer must ensure that the end of the gas pipes in all the outlets are closed before allowing gas from the main gas tanks to start flowing. That is elementary.

[32] PW6 in his opinion report had stated that the origin of the incident was from inside the 'Food & Tea' outlet Lots G48 and G49 (see p 71 exh P13), in the sense that gas had flowed out from the gas pipes in these outlets as the tapping points were not sealed off. According to investigations by PW1 and PW6, the roller shutter to Lots G48 and G49 were at the time of commissioning of gas supply closed and locked. The witnesses called on behalf of the second defendant, including DW1, have not disputed the fact that when the commissioning of gas supply was started on 14 December 2009 and right up to the time when the explosion occurred, the F&B outlet at Lots G48 and G49 were closed and locked. Thus, the second defendant had not checked the condition and status of the solenoid valve, ball valve and pipe plug in this outlet on 14 December 2009. The solenoid valve, ball valve and pipe plug at each and every F&B outlet must be examined by the second defendant before gas supply is commissioned, as any open end of the pipes would result in gas leakage, which is what happened in the F&B outlet at Lots G48 and G49.

[33] The second defendant denies negligence, and in this regard, DW1 in his testimony alleges that:

(a) the installation and testing of the LPG gas system was fully completed on 10 December 2009 (see Q & A 5 at p 5 DWS1), wherein the second defendant had already inspected the condition of the gas valves in Lots G48 and G49;

(b) the final inspection commenced on the morning of 10 December 2009 and ended in mid-afternoon on that day. The inspection was to ensure and confirm that all valves and equipment were in proper working condition and shut and sealed off until commissioning which was scheduled on 14 December 2009 (see Q & A 6 at p 6 para 2 DWS1);

(c) the F&B tenants were instructed by the management of the mall to cease all works and vacate the premises on 10 December 2009 (see Q & A 6 at p 5 DWS1);

(d) on 14 December 2009 at approximately 10.30am, DW1 had made another round of inspection within all the outlets except one (ie, the 'Food & Tea' outlet) to ensure that the outlets were opened up and their gas valves are shut. DW1 also informed the respective outlet staff to be on standby and not to meddle with any gas apparatus especially the gas valves;

(e) DW1 had noticed that one of the outlets ie, 'Food & Tea' Lots 48 and 49 was locked and not available for inspection and he had requested his office to call the tenant's representative and was told that they would arrive soon to open the outlet (see Q & A 7 at p 7 DWS1); and

(f) on 14 December 2009 when commissioning the supply of gas, DW1 could not wait for the arrival of the tenant of Lots G48 and G49 due to time constraint, as the commissioning of the gas supply had to be completed by 2pm on 14 December 2009.

[34] However, in cross-examination, DW1 conceded that:

(a) for the period from 10 December 2009 to at least 13 December 2009 evening or night, no inspection had been carried out at the premises (see pp 27–28 NOE dated 22 May 2017);

(b) during the period from 10 December 2009–13 December 2009, there were works being carried out in the general area (see p 28 NOE dated 22 May 2017); and

(c) as at 10 December 2009, the wet chemical system for Lots G48 and G49 has not been completed and for the installation and functioning of the wet chemical system, the wiring to the solenoid valve has to be connected (see pp 33–36 NOE dated 22 May 2017).

[35] DW1 conceded that he was fully aware of the danger in meddling with the gas valves when he advised the tenants who were present not to meddle with the gas valves and had allegedly inspected all the outlets on 14 December 2009 except for Lots G48 and G49. Therefore, the second defendant by having warned the tenants who were present not to meddle and carrying out the alleged inspection of all the other outlets on 14 December 2009 to ensure that

the valves were closed knew or foresaw the risk or danger in proceeding with the commissioning of the gas supply without having inspected the condition and status of the valves and pipe plug in Lots G48 and G49. DW1 ought to have waited for the arrival of the Lots 48 and 49 tenant to open the outlet and inspect the same before running gas to that section of F&B outlets. That would have been the most prudent and reasonable cause of action for DW1 to take. It is incumbent on DW1 to ensure that all the gas valves are closed in all the outlets before turning on the gas flow from the main tanks.

[36] The evidence also shows that DW4, Mr Wong Kam Weng, in cross-examination had stated that the tenant for Lots G48 and G49 had informed him that the wet chemical system for the said lot will be completed on Sunday 13 December 2009, but that work was not completed in time since the contractor did not turn up on that day to complete the works (see pp 90–91 NOE dated 26 May 2017). The fact that the wet chemical works for these two lots had not been completed would have alerted the second defendant, particularly DW1, as to nature of the gas safety valves and the gas detection system in place as these items would have been altered or tampered with or dismantled for the wet chemical works to be completed. In the circumstances, I agree with submissions of the plaintiff that the said incident was reasonably foreseeable and could have been avoided if only, as conceded by DW1, the second defendant had waited for the tenant of Lots G48 and G49 to arrive and had inspected or re-checked the outlet's gas valves and gas detection system before commissioning of the gas supply. In fact, DW1 has agreed in cross-examination:

(a) that as a gas specialist he needs to exercise caution in commissioning the gas supply (see p 27 NOE dated 22 May 2017);

(b) withholding the commissioning of the gas supply until the tenant for Lots G48 and G49 arrived to open the outlet would have been the best in the circumstances (see p 48 NOE dated 22 May 2017) but started it because they were supposed to finish the commissioning by 2pm and they were delayed. Therefore, DW1 proceeded to start the commissioning (see p 49 NOE dated 22 May 2017) notwithstanding the risk of danger posed by the unverified condition of the valves in Lots 48 and 49;

(c) DW1 agreed that as a gas specialist, although time is of the essence to complete the gas supply by 2pm, he had the authority to override AEON in the event that they had pressurised DW1 to complete the work on an urgent basis (see p 54 NOE dated 22 May 2017); and

(d) even assuming that there was tampering, the incident could have been avoided if he had waited for the 'Food & Tea' outlet tenant to be present and inspected that outlet before commissioning the gas supply (see p 55 NOE dated 22 May 2017).

[37] I am of the opinion that the reason of meeting the deadline set by AEON in commissioning the LPG system and the delay in meeting the deadline because the tenant to Lots 48 and 49 did not show up cannot be justification for the second defendant to go ahead with the commissioning of gas supply without inspection of the gas valves and gas detection system in Lots 48 and 49. It was imprudent of the second defendant to take on that risk, knowing well that safety considerations were the paramount and overriding concerns in the installation and commissioning gas piping systems. It was not open to the second defendant to neglect or disregard such risk. As was observed by Lord Reid in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at p 642:

> But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, eg, that it would involve considerable expenses to eliminate the risk. He would weigh the risk against the difficulty of eliminating it.

In this case, the risk of going ahead with the commissioning of gas supply without the prior inspection of the gas valves in Lots 48 and 49 far outweighs the reason of delay in meeting the deadline for completion. In this regard, I agree with submissions of the plaintiff that the reasons of delay as an overriding concern for starting the commissioning of gas supply cannot in law be an excuse or a recognised exception to ignore the obvious and foreseeable risk to life and limb, without first ascertaining the condition and status of the valves inside Lots G48 and G49 which were closed and locked at the time of commissioning of gas supply on 14 December 2009.

[38] I also agree with the plaintiff's submission that the alleged absence of a reasonable opportunity for examination of Lots G48 and G49 on 14 December 2009 due to time constraint will not exonerate the second defendant of its duty of care. It is the onus and responsibility of the second defendant to take reasonable precautions against risk of injury to persons and property damage to others. As was pointed out by Chapman J in *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217 at p 222:

> We then come to the second question, namely, were Gwent as situated that it was incumbent on them to take reasonable precautions against the risk of injury to a person into whose hands the might foreseeably come? This has involved embarking, once again, on an enquiry as to the scope of Lord Atkin's famous speech in *Donoghue v Stevenson*, particularly in relation to the test that was laid on the absence of 'a reasonable opportunity for intermediate'. It is now plain that the mere existence of such an opportunity will not exonerate a manufacturer or hirer-out of a chattel ...

[39] This brings me to the issue of the second defendant's failure to carry out the commissioning of the gas supply in sectional basis especially so since

Lots G48 and G49 were closed and locked. The diagram on the scope of works for the LPG system (at p 156 Bundle B) shows that there are five ceiling valves in the gas pipeline situated at different locations from Lot G92 and G93 ('Kenny Rogers'). It is an agreed fact that the second defendant intended to carry out the commissioning of gas supply in stages. DW1 agreed that these isolation valves can be used if needed for commissioning of gas supply on a sectional basis (see pp 38–39 NOE dated 22 May 2017).

[40] PW1 in his evidence had stated that the project was large and the role of the said ceiling valves is for isolation purposes in case of maintenance or other events (see p 11 NOE dated 15 March 2017). PW1 further stated (see p 19 NOE dated 15 March 2017) that:

> ... there were 5 ceiling valves and the commissioning can be done be sectional basis. After one part is settled, go to second part. It is good for safety practice and as a competent person, they must know. They cannot simply open all the gas and flow the gas all the way from starting to end of the valve. This is safety work and safety practice. This is standard operating procedure, which the competent person is always asked to do.

PW6 in his report (at p 82 Bundle B) had opined as follows:

> We would also expect that the final installation and testing of the LPG system in a large complex such as this would be carried out by opening the valves in stages. The manner in which the progress of the exercise, starting with Jusco then followed by Kenny Rogers indicated that was indeed the intention. However, events that had occurred later indicated that it had not been the case. If the final installation was intended to be carried out in stages, we would expect that Mr Tan or Mohamad Faizul would stop work once they received the call from Mr Elvis indicating that LPG was gushing out from Locales Café in Food Avenue. Outlets within Food Avenue were at the end of the pipeline system and there were two ball valves between Locales Café and Kenny Rogers (ie, the 100mm and the 65mm valves). The two valves were not supposed to be opened when the final installation team was still at the Kenny Rogers outlet.
>
> When Mohamad Faizul received the call from Mr Elvis Lim, he should have known that someone had already opened the 100mm and 65mm valves. The failure to act implied that releasing the LPG in stages was not the intention or priority of the people who were carrying out the final installation.

Further, PW6 in his report (at p 78 Bundle B) had stated that for the final installation of the LPG system to the Kenny Rogers lot, only the 150mm ball valve needed to be opened. It is not necessary for the other smaller valves in the pipeline to be opened. PW6 in his oral evidence (see p 57 NOE dated 16 March 2017) maintained that the main valves can be used to sectionalise or compartmentalise the commissioning and the said valves are not just for maintenance. Thus, I find that the second defendant could have averted this

tragedy by carrying out the commissioning of gas supply in stages by using the sectional valves in the pipeline to isolate the areas. And the failure of the second defendant to do so is a breach of its duty of care.

[41] The plaintiff also complains that the second defendant had breached its duty of care by carrying out the commissioning of the gas supply on 14 December 2009 without first ensuring that the condition and status of the solenoid valve, ball valve and pipe plug especially in Lots G48 and G49 were in good working order despite having knowledge that works had been carried out at those premises after their inspection on 10 December 2009. The evidence shows that DW1 knew that there were works carried out in the general and kitchen area of the F&B outlets during the period from 10 December 2009 and 14 December 2009. The evidence also shows that DW4 knew that the wet chemical system contractors were scheduled to complete the wet chemical system works in Lots G48 and G49 on 13 December 2009. These works would have entailed some tinkering with the solenoid valve. However, these contractors did not appear to have completed the works by 13 December 2009. The evidence also shows that the solenoid valve, ball valve and pipe plug are extremely important safety components in the LPG system and I find that before the commissioning of the gas supply, the second defendant, as any prudent competent professional in the field would have done, ought to have ensured that these safety mechanisms were in place and in working order, especially when third party contractors were known to have carried out works within Lots 48 and 49 after the second defendant's inspection on 10 December 2009. Such prior inspection is warranted to ensure that there is no tampering of the LPG system since its last inspection on 10 December 2009. The importance of this is borne out by the fact that second defendant has in its defence raised the possibility of these safety valves being tampered with, wittingly or unwittingly, by unknown persons. In the circumstances, I agree with the plaintiff's contention that the second defendant had breached his duty to ensure the safety valves and pipe plug within Lots G48 and G49 were intact and in working order before carrying out the commissioning of the gas supply.

[42] The second defendant had for the first time on 14 December 2009 run LPG through the gas pipelines. Previously, the testing was done with compressed air (see p 49 NOE dated 22 May 2017). The second defendant did not know the condition and status of the piping and the valves in Lots G48 and G49, since DW1 did not have access to these lots. Consequently, the risk of an untoward incident due to gas release is not far-fetched or fanciful for the second defendant not to have taken the appropriate safety and precautionary measures as discussed above. In *Wyong Shire Council v Shirt* [1980] HCA 12 the Australian High Court stated:

> A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone* [1951] UKHL 2; [1951] AC 850, may nevertheless be plainly

> foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.

The evidence shows that the second defendant had assumed that the risk of gas release due to open valves within Lots G48 and G49 was quite unlikely to occur and had therefore proceeded to commission the gas supply. However, in so doing, the second defendant had failed to appreciate the fact that such risk is plainly foreseeable and had further failed to ensure that steps be taken to avert such risk especially in light of the fact that Lots G48 and G49 were closed and locked. As conceded by DW1, had the second defendant undertaken the commissioning of the gas supply on a sectional basis, the risk of explosion would have been averted. Therefore, I find that there is clear breach of the second defendant's duty of care.

[43] As to the causal link between the incident and the damages suffered by the plaintiff, I find that causation and damage are not disputed issues in this case. The second defendant's own evidence by way of witness statements and oral testimony indicate that the damage sustained by the plaintiff was caused directly by the accumulation of LPG within Lots G48 and G49 resulting in an explosion, the ignition for which in all probability came from the workers using electrical machineries such as the electric saw and air compressor in the vicinity. It is settled law that a plaintiff can recover only that loss which a defendant could reasonably foresee would ensue to the victim of the tort. So, the test to be applied is one of reasonable foreseeability. See *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103; [1977] 1 LNS 29; and *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585. In this case, the plaintiff's claim for damages is for the loss and damage arising from the incident suffered by AEON and for which the plaintiff had made out payment to AEON under the two insurance policies. Therefore, from the facts it can be discerned that the type of loss and damage claimed is entirely foreseeable and is not remote.

[44] The causal link between the second defendant's breach of duty and the loss and damage can be further seen from the findings of PW1 in his investigation report dated 10 February 2010 wherein he had stated as follows (see pp 187–188 Bundle B):

> Hasil maklumat awal pemeriksaan yang dijalankan oleh pihak Bomba dan Penyelamat di tempat disyaki bermulanya sumber letupan selepas kejadian, mendapati bahawa terdapat injap bebola yang dalam keadaan terbuka dan hujung

paip tersebut tidak dikedap (sealed off) dengan pipe plug di kedai bernombor G48 & G49.

Pemeriksaan terperinci di lot berkenaan mendapati bahawa injap bebola yang dimaksudkan oleh pihak Bomba dan Penyelamat dalam tertutup dan masih tidak dikedap (sealed off) dengan pipe plug ...

... Terdapat injap bebola (ball valve) di penghujung setiap paip dropper yang belum disambungkan ke meter, tetapi bukaan di penghujung paip dropper selepas injap bebola tidak dipasang dengan pipe plug ataupun di sealed off.

PW1 concluded his investigation findings (see p 189 Bundle B) as follows:

Punca pelepasan gas LPG daripada paip gas adalah disyaki disebabkan oleh kedudukan injap bebola (ball valve) yang berada dalam keadaan terbuka di ruangan dapur di kedai Lot G48 & G49. Ini ialah kerana semasa pihak Jabatan Bomba dan Penyelamat sampai di tempat kejadian dan membuat pemeriksaan di lot berkenaan, mereka mendapati bahawa injap ball valve pada talian paip dropper adalah dalam keadaan terbuka. Injap tersebut sepatutnya berada dalam keadaan tertutup. Didapati juga paip tersebut tidak dikedap dengan paip plug (ia tidak disealed off).

The investigation findings of PW1 was that the pipe plug in some of the tenanted outlets, particularly Lots 48 and 49 were not sealed off (ie, *tidak dikedapkan*), and this was the cause of the gas leak that led to the explosion. These independent findings of PW1 quite clearly and directly connect the causal link between the incident and the damage. Thus, I find that the plaintiff has on a balance of probabilities established liability of the second defendant in negligence.

[45] As to the other cause of action of breach of statutory duty, the plaintiff submits that the second defendant has breached its statutory duty in failing to comply with the relevant provisions of the Gas Supply Regulations 1997, in particular, the following regulations:

53(2) Where the supply has been turned off, no person shall turn it on again until he notifies all the affected consumers of his intention and carefully checks all the outlet and pilots to ascertain whether the supply is turned on or turned off.

60(3) If the gas installation is not to be used at once it shall be sealed off at every outlet with appropriate fitting.

63(1) If the responsible person or his representative knows or has reason to suspect that gas is escaping into the premises, he shall immediately take all reasonable steps to cause the supply of gas to be shut off at the necessary place to prevent further escape of gas.

65 No gas shall be taken from the gas main pipeline until:

(b) the gas installation connected to the gas main pipe has been inspected, tested and found to be safe by a competent person registered with the Director General.

[46] The plaintiff submits that the evidence clearly shows that the second defendant was in breach of the statutory obligations or duties under the Gas Supply Regulations 1997 referred to above and in particular:

(a) failed to carefully check all the outlet and pilots to ascertain whether the supply is turned off pursuant to reg 53(2);

(b) failed to ensure that the gas installation which was not to be used at once were sealed off at every outlet with the appropriate fitting pursuant to reg 60(3); and

(c) failed to immediately take all reasonable steps to cause the supply of gas to be shut off at the necessary place to prevent further escape of gas promptly when Mr Elvis Lim had notified Encik Muhammad Faizzul of gas release in Locales Café pursuant to reg 63(1).

[47] The law is settled in that a private law cause of action for breach of statutory duty does not necessarily arise in all situations of breach of statutory duty. In *Master Brisbane ak Itang v Robinson Lee (c/o Sekolah Kebangsaan (Cina) Sungai Menyan) & Ors* [2013] 5 MLJ 604 the High Court held that:

> ... in an action for breach of a statutory duty irrespective of carelessness, ie *simpliciter*, a breach of statutory duty is not by itself sufficient to give rise to any private law action. A private law cause of action only arises if it can be shown as a matter of construction of the statute that the statutory duty is imposed for the protection of a limited class of the public and that Parliament intends to confer on members of that class a private right of action for breach of the duty. The mere assertion of the careless exercise of a statutory duty is not sufficient in itself to give rise to a private law cause of action.

This principle was reiterated by the Court of Appeal in *Shahidan Shafie v Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587 in the following terms:

> [21] Breach of statutory duty per se does not give rise to a private law cause of action. It is best explained by the learned authors in *Tort Law* (3rd Ed) by Nicholas J MacBride and Roderick Bagshaw where they lucidly put it this way:
>
> > By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that the breach of a statutory duty owed to another will only amount to a tort if Parliament intended, when it created that duty, that breach of that duty should be 'actionable in tort'.
>
> [22] The House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 3

WLR 152, through Lord Browne-Wilkinson at p 166 puts it in this manner:

> The basic proposition is that in the ordinary case a breach of statutory duty does not by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty ...
>
> If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd.* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.

[48] Similarly, *Clerk & Lindsell on Torts* (18th Ed), at p 599 on the essentials of an action for breach of statutory duty states as follows:

> The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss would not have occurred if the defendant had complied with the terms of the statute. This rule performs a function similar to that of remoteness of damage.

Thus, the question then is whether the provisions in the Gas Supply Regulations 1997 relied on by the plaintiff evoke an intention of Parliament to give a private cause of action for breach of statutory duty in the circumstances of the facts as presented in this case. The Gas Supply Regulations 1997 is made pursuant to s 39 of the Gas Supply Act 1993 that provides that the Minister may make regulations in respect of any matter which may be prescribed under the Act and in particular matters relating, inter alia, to the management of any pipeline or piping system under s 11 of the Act. The overall purpose and scheme of the Act are:

> ... to provide for the licensing of the import into regasification terminal, regasification, shipping, transportation, distribution, retail or use of gas in the supply of gas through pipelines and related matters, the supply of gas at reasonable prices, the control of gas supply pipelines, installations and appliances with respect to matters relating to safety of persons in the distribution, retail or use of gas and for purposes connected therewith.

[49] The Act and the regulations also provide that in the event of breaches of the provisions of the Act or the regulations, the offender is liable to be dealt with by penal sanctions. Under the Act and regulations, the energy commission as the regulatory authority is tasked to supervise and regulate matters that come

within the ambit of the Act, including taking action in respect of any transgressions of the stipulations therein. In this case, arising from the incident, the second defendant was charged with a criminal offence under the Act and was however acquitted and discharged after trial at the magistrate's court. Therefore, I am of the view that the breach of any statutory duty imposed on the second defendant by virtue of it being a 'competent person' licensed under the Act, would in the first instance be dealt with by the energy commission, and if the plaintiff is dissatisfied with that decision or ruling of the energy commission, then the plaintiff's remedy is in the realm of public law. Having considered the intent and purport of Parliament in enacting the Act, I am of the view that it is not the intention of Parliament to provide a private law remedy to persons aggrieved, such as the plaintiff herein, by the actions or omissions of any 'competent person' licensed under the Act. Therefore, I find that the present action for breach of statutory duty is misplaced and unsustainable.

[50] In the premise of the foregoing, I find that the plaintiff has successfully established liability in negligence against the second defendant, and therefore ordered that damages be assessed together with interest and cost.

Claim allowed, damages ordered to be assessed with costs.

Reported by Afiq Mohamad Noor